85-338 (1)

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

MABLE A. REDIC,

Petitioner,

vs.

DAVID S. SCHWARTZ,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

==========

LOUIS L. LESESNE, JR.
980 United Carolina Bank Building
212 South Tryon Street
Charlotte, N.C. 28281
704/372-5700

Counsel for Petitioner

QUESTION PRESENTED

Did the Court of Appeals exceed its authority under Rule 50, F.R.Civ.P., and the Seventh Amendment by reversing a jury verdict and holding that a directed verdict should have been granted, where that holding was based on evidence never tendered or introduced into evidence at trial, and where that holding was premised on resolving credibility disputes in favor of the moving party, even though there was circumstantial evidence supporting the jury verdict?

PARTIES

The parties to this proceeding are petitioner Mable A. Redic and respondent David S. Schwartz.

TABLE OF CONTENTS

Question Presented i

Parties. ii

Table of Authorities iv

Opinion Below. 2

Jurisdiction 2

Constitutional Provision and Regulations Involved 2

Statement of the Case. 5

Reasons for Granting the Writ. . . . 11

Conclusion 23

APPENDIX

Opinion of the Court of Appeals, May 9, 1985 . . . . . 1a

Court of Appeals Order Denying Rehearing, June 5, 1985 . . . . . 28a

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer City, 470 U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) . . . 12

Atlantic & Gulf Stevedores Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962) 12

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). . . . 13

Case v. Morrisette, 475 F.2d 1300 (D.C. Cir. 1973) 12

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962). 16, 18

Eastern States Retail Lumber Dealers Ass'n. v. United States, 234 U.S. 600 (1912) 18

Hodges v. Hodges, 37 N.C.App. 459, 246 S.E.2d 812 (1978) 14

Holland v. United States, 348 U.S. 121 (1954) 18

Lavender v. Kurn, 327 U.S. 645 (1946) 16, 19

Lindsey v. Board of Regents, 607 F.2d 672 (5th Cir. 1979) 16

McKinley v. Hinnant, 242 N.C. 245, 87 S.E.2d 568 (1955) . . . 15

O'Briant v. Lee, 214 N.C. 723, 200 S.E. 865 (1939) 14, 15

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 14

Ricks v. Batchelor, 225 N.C. 8, 33 S.E.2d 68 (1945) 15

Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29 (1944) 18

United States v. United States Gypsum Co., 333 U.S. 364 (1948). . . 12

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 18

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 18

Washington v. Davis, 426 U.S. 229 (1976) 19

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 17

Constitution, Statutes and Rules

Federal Rules of Civil Procedure

Rule 50 . . . . . 12, 13
Rule 52 12

Truth in Lending Act

§ 103, 15 U.S.C. § 1602(f). . . 7
§ 125, 15 U.S.C. § 1635 6
§ 130, 15 U.S.C. § 1640 5

United States Constitution

Amendment VII 2, 12

Regulations

Regulation Z of the
Federal Reserve Board

12 C.F.R. § 226.2(a)(17)(i) . . 3, 8
12 C.F.R. § 226.2(a)(25). . . . 4, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

MABLE A. REDIC,

Petitioner,

vs.

DAVID S. SCHWARTZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Mable A. Redic respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 9, 1985.

OPINION BELOW

The decision of the court of appeals, which is reported at 762 F.2d 1181, is set out at pp. 1a-27a of the Appendix. The order of the court of appeals denying rehearing, which is not reported, is set out at pp. 28a-29a of the Appendix. There was no opinion of the district court.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1985. Petitioner's petition for rehearing was denied on June 5, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

12 C.F.R. § 226.2(a)(17)(i):

"Creditor" means (i) A person (A) who regularly extends consumer credit[3] that is subject to a finance charge or is payable by written agreement in more than 4 installments (not including a downpayment), and (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement where there is no note or contract.

[3] A person regularly extends credit only if it extended credit more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year.

12 C.F.R. § 226.2(a)(25):

"Security Interest" means an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law.

STATEMENT OF THE CASE

This is an action under the Truth in Lending Act (hereinafter "the Act"), 15 U.S.C. § 1601 et seq. The district court had jurisdiction under § 130 of the Act, 15 U.S.C. § 1640(e). The case arises out of a 1981 transaction in which respondent Schwartz and Gary H. Watts Realty Company lent petitioner $3000 to reinstate her mortgage, after her mortgagee had begun foreclosure proceedings. Respondent and Watts Realty charged petitioner usurious interest of 50 per cent on the loan. The loan was to be repaid in one year and was secured by a security interest in petitioner's home.

The loan documents did not, however, take the form of a loan. Respondent attempted to conceal the true nature of the

transaction and created a sham transaction by disguising the loan as a sale of petitioner's home. Petitioner executed a warranty deed to her home, and respondent "leased" petitioner's home to her for one year and gave her an "option" to repurchase at the end of the year.

Petitioner sought relief under § 125 of the Act, 15 U.S.C. § 1635, which permits a borrower to rescind a credit transaction where the creditor takes a security interest in the borrower's home. Respondent refused to rescind on the claims that (1) the transaction with petitioner was not a loan and (2) he was not a "creditor," as defined by the Act. The jury resolved both issues in petitioner's favor as to respondent Schwartz, and the district court entered judgment allowing rescission and other relief under the Act, along with damages for a pendent usury claim.

The court of appeals affirmed the jury verdict that the transaction with petitioner was a usurious loan with a security interest (22a), but it reversed the jury verdict that respondent Schwartz was a creditor,[1] and held that the district court should therefore have granted his motion for directed verdict on the Truth in Lending claim (25a).

A "creditor" is one who "regularly" extends credit. 15 U.S.C. § 1602(f). The Act does not define "regularly," but Federal Reserve Board Regulation Z establishes a numerical test: a person is a creditor if he extends credit secured by

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[1] Watts Realty did not participate in a sufficient number of transactions to be found a creditor, and its directed verdict motion was allowed by the district court. The district court allowed relief under the Act solely against respondent Schwartz.

a dwelling five times during the preceding year. 12 C.F.R. § 226.2(a)(17)(i), fn. 3.

Respondent in 1981 engaged in 12 other transactions having the same format as the loan to petitioner. In each, homeowners facing foreclosure signed deeds, purporting to sell their homes to respondent, and leases with an option to repurchase at the end of the lease term. The jury found that at least five of these 12 transactions were, like the transaction with petitioner, loans with a security interest, disguised as sales, and that respondent was a "creditor" under the Act.

A transaction recognized under state law as a loan with a security interest is also a credit transaction and security interest under the Act. 12 C.F.R. § 226.2(a)(25). North Carolina law makes the true character of such transactions

dependent on the parties' intent, not on the form of the documents. Intent must be determined, not from what the parties say their intent was, but from the objective facts and circumstances surrounding the transaction.

Petitioner showed at trial that all 12 transactions were characterized by objective factors recognized under state law as being inconsistent with a sale and therefore supporting the verdict that the parties' intent was to make a loan rather than a sale: (1) the putative grantors were in financial distress; (2) the putative grantors were allowed to remain in possession of the premises; (3) consideration for the alleged sales was inadequate; and (4) the so-called lease agreements imposed on the putative grantors, as "tenants," obligations which state law imposed on the landlord in a

true landlord-tenant relationship.

There was also direct evidence at trial from three of the 12 so-called grantors (along with petitioner) that their intent was to make a loan. Four putative grantors testified for respondent at trial that their intent was to sell their property. The six remaining grantors did not testify at trial.[2] Respondent testified that all 12 transactions were sales and that he had never extended credit secured by a dwelling.

The Court of Appeals held that the jury was not free to credit petitioner's circumstantial evidence which was inconsistent with a sale and that the jury could not disbelieve respondent's evi-

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[2] The apparent discrepancy is accounted for by one witness' testifying inconsistently that the parties' intent was both to make a loan and a sale.

dence as to any particular transaction if both parties to that transaction testified that it was their intent to effect a sale (24a).

It then held, relying on affidavits from putative grantors which were never introduced at trial, that such conclusive evidence had been adduced in a sufficient number of transactions to make it impossible for petitioner to show the requisite five transactions (23a-25a). Consequently, it reversed the award of relief under the Act.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit decision manifests a continuation of that court's disregard of the limited role of appellate review of a jury's factual determinations. This Court only recently reviewed, in a non-jury context, the Fourth

Circuit's misapprehension and misapplication of the clearly erroneous rule under Rule 52, F.R.Civ.P. Anderson v. City of Bessemer City, 470 U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

This case represents an even more dramatic incursion into the fact-finding process, since appellate review of jury verdicts under Rule 50, F.R.Civ.P., is even more circumscribed than is the review of non-jury findings of fact under Rule 52. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Case v. Morrisette, 475 F.2d 1300, 1306 (D.C. Cir. 1973). Reversal of the jury verdict represents an infringement on petitioner's Seventh Amendment right to jury trial. Atlantic & Gulf Stevedores Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 360 (1962). Because of the importance of the jury's role in the fact-finding process and its firm place in our

jurisprudence, "any seeming curtailment of the right to a jury trial should be scrutinzed with the utmost care." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959).

The Fourth Circuit's willingness to review, de novo, the jury's factual findings, to resolve credibility disputes in favor of the party moving for directed verdict, and to base those credibility resolutions on evidence not even introduced at trial, without ever even mentioning or invoking the applicable test under Rule 50, represents such an irregular and unprecedented deviation from the accepted and usual course of appellate review of the sufficiency of the evidence supporting a jury verdict that the writ should issue to review the decision.

The court's opinion is flawed by two

independent infirmities, either of which furnishes a basis for review.

I.
THE COURT OF APPEALS IMPROPERLY RESOLVED CREDIBILITY DISPUTES WHICH MUST BE LEFT TO THE JURY

The critical issue for decision by the jury was one of intent, a pure question of fact. Pullman-Standard v. Swint, 456 U.S. 273, 287-288 (1982). The court of appeals held that the jury was required to believe direct evidence from both parties to a particular transaction that the parties' intent was to sell the property (24a), even though petitioner adduced circumstantial evidence which would support a contrary finding and even though the substantive rule is that such direct evidence is not only not conclusive but is insufficient to support a finding of intent. O'Briant v. Lee, 214 N.C. 723, 731, 200 S.E. 865, 870 (1939); Hodges v. Hodges, 37 N.C.App. 459, 468,

246 S.E.2d 812, 817 (1978). Intent must be proved by objective facts and circumstances outside the deed, inconsistent with the idea of an absolute deed. Ricks v. Batchelor, 225 N.C. 8, 11-12, 33 S.E.2d 68, 70 (1945); McKinley v. Hinnant, 242 N.C. 245, 251, 87 S.E.2d 568, 573 (1955). Any doubts about the nature of the transactions should be resolved in favor of a loan and mortgage, rather than a sale. O'Briant v. Lee, supra.

The court of appeals acknowledged the above rules (18a-21a) and never questioned the sufficiency of the circumstantial evidence supporting the verdict. It instead held that direct evidence of intent was conclusive, and the jury could not disbelieve such direct evidence in favor of circumstantial evidence sup-

porting a contrary result. (23a)[3]

The standard to be applied in ruling on motions for directed verdict is familiar and well established: The court must resolve all credibility disputes in favor of petitioner, as the non-moving party, it must view the evidence in the light most favorable to the non-movant, and it must give the non-movant the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn. Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 (1962); Lavender v. Kurn, 327 U.S. 645, 653 (1946).

The court of appeals stood this rule

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[3] The Fifth Circuit has characterized a similar claim -- that circumstantial evidence cannot support a verdict where countered by direct evidence -- as "so lacking in merit that it does not require discussion." Lindsey v. Board of Regents, 607 F.2d 672, 675 (5th Cir. 1979).

on its head. Indeed, it is significant that the Court never referred to the rule or attempted to explain why the inferences arising from petitioner's evidence would not support the verdict. It failed to focus on the sufficiency of the evidence supporting petitioner's position, see Wilkerson v. McCarthy, 336 U.S. 53, 63 (1949), and instead looked solely at the evidence supporting the moving party's position.

It then compounded its error by resolving credibility disputes in respondent's favor. Even if respondent's mere assertions of intent could support a finding of intent to make a sale -- a dubious proposition under state law -- they can hardly compel such a finding. It is the function of the jury, not the court, to weigh the contradictory inferences and to determine which is more

persuasive. Continental Ore Co. v. Union Carbide Corp., supra, 370 U.S. at 701; Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1944).

In holding that the jury was not free to credit circumstantial evidence supporting an inference contrary to the direct evidence, the court of appeals denigrated circumstantial evidence to a position inferior to that of direct evidence, when in fact one is intrinsically no different from the other, and either may sustain the jury's verdict. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714, n. 3 (1983); Holland v. United States, 348 U.S. 121, 140 (1954); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-267 (1977). Indeed, proof of intent can sometimes only be proved by circumstantial evidence. Eastern States Retail Lumber

Dealers Ass'n. v. United States, 234 U.S. 600, 612 (1915).

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.

Washington v. Davis, 426 U.S. 229, 253 (1976)(Stevens, J., concurring).

The court's function in ruling on Rule 50 motions is limited to determining whether the non-movant's evidence was sufficient to support the verdict. The court implicitly recognized the sufficiency of petitioner's evidence. The fact that it might have found the direct evidence more persuasive is meaningless, as this decision is left to the jury, to determine which version of the facts is more persuasive. Lavender v. Kurn, supra, 327 U.S. at 653.

II.
THE COURT OF APPEALS BASED ITS DECISION ON EVIDENCE NEVER INTRODUCED AT TRIAL

The Court of Appeals further compounded its error by accepting as true and not subject to dispute affidavits never tendered, much less introduced, at trial.[4] Indeed, even respondent did not argue on appeal that the affidavits in question should have been considered in connection with the directed verdict motion. The court nonetheless held that the district court was required to consider these affidavits in ruling on the

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[4] The affidavits had been simply tendered in connection with summary judgment motions. The court's explicit reference to error in not granting the directed verdict motion (25a) and its treatment of the pendent claim (26a-27a) dispel the respondent's anticipated claim that the court's decision is in actuality a ruling on his summary judgment motion.

directed verdict motion.

This unprecedented irregularity was an integral aspect of the court's decision. The Court held that respondent offered conclusive evidence of intent from both parties in a sufficient number of transactions that the jury could not find that five or more of the 12 transactions were loans (24a-25a). However, in 9 of the 12 transactions the putative grantor either did not testify at trial or testified that the parties' intent was to make a loan. Only four putative grantors testified at trial that they intended to sell their home.

The court's rule crediting the movant's evidence and holding that direct testimony of intent to make a sale could not be disbelieved would not have resulted in reversal had the court limited application of rule to evidence introduced at trial. Only by relying on the

affidavits of additional putative grantors whom respondent did not even call as witnesses at trial did the court of appeals find a sufficient number of transactions to support its decision.

It requires no citation of authority to show that the function of a directed verdict motion is to test the sufficiency of the evidence heard by the jury. The opinion inexplicably deviates from this rule and relies on evidence which respondent never even offered at trial and which was never heard by the jury. Requiring a district court to consider such evidence which even the moving party has not sought to introduce or rely upon wreaks havoc with the usual procedure for considering such motions.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

Louis L. Lesesne, Jr.
980 United Carolina Bank Building
212 South Tryon Street
Charlotte, N.C. 28281
704/372-5700

Counsel for Petitioner

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1393(L)

MABLE A. REDIC,

Appellee,

versus

GARY H. WATTS REALTY CO., AND
DAVID S. SCHWARTZ,

Appellants,

and

SHIRLEY E. SCHWARTZ,

Defendant.

No. 84-1523

MABLE A. REDIC,

Appellee,

versus

GARY H. WATTS REALTY CO.,
DAVID S. SCHWARTZ,

Appellants,

and

SHIRLEY E. SCHWARTZ,

Defendant.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 82-0777).

Argued: January 8, 1985
Decided: May 9, 1985

Before
RUSSELL and CHAPMAN,
Circuit Judges,
and
HAYNSWORTH,
Senior Circuit Judge

Ralph C. Clontz, Jr. (Clontz and Clontz on brief) for appellants; Louis L. Lesesne, Jr. (Gillespie & Lesesne on brief) for Appellee.

CHAPMAN, Circuit Judge:

This appeal arises out of a real estate transaction between plaintiff-appellee, Mable A. Redic, and defendants-

appellants, Gary H. Watts Realty Company, a corporation, and David S. Schwartz, a sole proprietor. The defendants appeal from the judgment of the district court, entered after a jury verdict, awarding Redic damages against Schwartz under both the Truth in Lending Act, 15 U.S.C. § 1601 et seq. (1982), and North Carolina's usury statute, N. C. Gen. Stat. § 24-2 (1965), ordering the defendants to reconvey the property to her, and awarding Redic her counsel fees and costs. We conclude that the district court erred in denying Schwartz' motion for a directed verdict as to Redic's Truth in Lending claim because the evidence conclusively showed that Schwartz was not a "creditor" within the meaning of the Act. Accordingly, we reverse that portion of the district court's decision awarding Redic relief under the Truth in Lending Act but

affirm that portion of the decision awarding her damages against Schwartz under North Carolina's usury statute.

I

Redic purchased her home in 1974 from the Department of Housing and Urban Development. Lomas & Nettleton Company, a mortgage loan company located in Virginia, held a deed of trust which secured a FHA loan. Due to a series of financial difficulties in 1981, Redic went into default on her monthly mortgage payments and, in December 1981, Lomas & Nettleton initiated a foreclosure action.

In an effort to save her home, Redic inquired of a number of potential lenders about obtaining a loan in order to bring her mortgage account current. Redic was at that time a participant in a Chapter 13 wage earner plan in the bankruptcy court. While Redic was seeking a loan at

traditional lending institutions, several real estate investors made unsolicited offers to purchase her equity in the home. One of these investors was David Schwartz. On December 23, 1981, Redic, Schwartz, and Watts Realty Company entered into the transaction which is the subject of this action.

The parties disagree over the nature of the transaction. According to the defendants, Schwartz and Watts Realty Company purchased Redic's equity in her home for $17,100, leased it back to her for a year, and gave her an option to repurchase it at any time within a year for the sale price plus a realtor's commission of 3.5 percent. Schwartz denied that he had discussed making a loan to her and insisted that he had only discussed purchasing her home. Redic claims that Schwartz offered to lend her the

necessary funds to bring her mortgage current and to allow her one year in which to repay the amount lent. Redic insists that despite the parties' intention, the closing documents prepared by the defendants consisted of a general warranty deed, a lease, and an option to repurchase. Redic contends that the transaction was a loan with a security interest, rather than a sale with an option to repurchase, notwithstanding the form of the documents.

Redic was unable to repay or repurchase at the conclusion of the one year period and Schwartz refused to extend the time. Redic then gave the defendants notice that she was rescinding the transaction pursuant to § 125 of the Truth in Lending Act, 15 U.S.C. § 1635(a). The defendants did not respond to Redic's notice of rescission.

Redic then filed this action in the district court under the Truth in Lending Act. Redic alleged that the transaction in question was a loan with a security interest, rather than a sale with an option to repurchase, and that the defendants had failed to comply with the disclosure requirements contained in the Truth in Lending Act. Redic also asserted a pendent claim under North Caolina law, claiming that the defendants had charged her usurious interest in violation of N. C. Gen. Stat. § 24-2 (1965). Accordingly, Redic sought (1) a civil penalty of $1,000 plus costs and attorney's fees, (2) rescission of the transaction under the Truth in Lending Act and Revised Regulation Z and a refund of any finance and other charges paid, and (3) damages under North Carolina's usury statute. Redic alleged jurisdic-

tion under § 130 of the Act, 15 U.S.C. § 1640(e).

The defendants denied that the transaction in question was a credit transaction or that they were "creditors" under the act. The defendants insisted that they were not "creditors" within the meaning of the Act because they had not "regularly" extended consumer credit. The defendants acknowledged, however, that they made no disclosures under the Act and that they had not rescinded the transaction.

During 1981 Schwartz entered into twelve similar transactions with other homeowners. Each transaction followed a similar format as that followed in Redic's case: execution of a warranty deed with a lease and an option to repurchase at the end of the so-called lease. At trial Redic contended that these other

transactions also represented extensions of credit, and that Schwartz was therefore a "creditor" within the meaning of the Act.

In each of the other twelve transactions Schwartz approached the putative grantor after learning that the grantor was facing foreclosure proceedings on his home. Each lease agreement required the putative grantor/tenant to maintain the interior and exterior of the premises. In each transaction the homeowner was allowed to continue in possession of the premises and was given an option to repurchase at the end of the lease. Although Schwartz entered into twelve similar transactions during 1981, Watts Realty Company was a party to only one of those transactions.

Both sides moved for summary judgment. In support of their motion for

summary judgment, the defendants submitted the unrefuted affidavits of the grantors in eight of the twelve relevant transactions. In these affidavits each grantor swore that he (1) sold his home to Schwartz, (2) rented his home from Schwartz (for varying terms with some leases renewed), (3) received an option to repurchase which he was not obligated to exercise and had cancelled, (4) never requested or received a loan from either defendant, and (5) knew that he had absolutely sold his property to Schwartz. Redic's evidence opposing the defendants' motion for summary judgment consisted of affidavits and a deposition from parties involved in only four of the twelve relevant transactions. She also filed her counsel's affidavit to introduce some of the documents executed by the parties to the other eight trans-

actions, which evidence corroborated the affiant's testimony. The district court denied both motions for summary judgment.

The case was tried before a jury. At the conclusion of the evidence, the district court granted Watts Realty Company's motion for directed verdict with respect to Redic's claim under the Truth in Lending Act because there was insufficient evidence of its status as a "creditor" under the Act. Redic's pendent claim against Watts Realty Company under state law was submitted to the jury. The district court denied Schwartz' motion for directed verdict.

The jury's verdict awarded Redic damages against Schwartz in the amount of $2,944, representing $1,944 in damages for charging usurious interest and $1,000 as a statutory penalty under the Truth in Lending Act. The district court's judg-

ment also ordered the defendants, including Shirley E. Schwartz, to execute and deliver to Redic a warranty deed conveying to her the property in question, subject to: (1) Redic's repayment of the $3,000 loan made by the defendants, (2) her reimbursement to the defendants for payments made to the mortgage company during the pendency of the action, and (3) her reassuming the existing FHA deed of trust. Also, the district court ordered Schwartz to pay Redic's attorney's fees and costs in the amount of $31,382.53. This appeal followed.

II

A

In general, the Truth in Lending Act requires a "creditor" to disclose certain credit terms to a borrowing consumer, including the amount of a finance charge

and the annual percentage rate. 15 U.S.C. § 1631(a) (1982); 12 C.F.R. §§ 226.17 and 226.18 (1984). Failure to make the requisite disclosures can subject the creditor to civil liability in an amount equal to double the finance charge paid in connection with the transaction, but in no event less than $100 or more than $1,000. 15 U.S.C. § 1640(a)(2)(A).

The Truth in Lending Act imposes additional duties on a creditor, and different debtor rights come into play, if the creditor retains or acquires a security interest, as part of a credit transaction, in any real property "which is used as the principal dwelling of the person to whom credit is extended." 15 U.S.C. § 1635(a). The Act gives the debtor a right of rescission which normally must be exercised within three

days of the consummation of the transaction, and the creditor must provide the debtor with written notice of this limited right to rescind in addition to making all of the other usual disclosures required with any extension of credit. Id. When the creditor fails to disclose any items of the requisite information, the Act provides that the debtor's right to rescind is not limited by the normal three day period but continues until all the disclosures are made. 15 U.S.C. § 1635(f).

It is undisputed that the defendants failed to give Redic the disclosures required by the Act. Nor is there any dispute that Redic notified the defendants of her intent to rescind the transaction. Rather, the defendants contend that the transaction was not governed by the Act, and thus not subject

to the Act's civil penalties and right of rescission, because they were not "creditors" within the meaning of the Act.

Only "creditors" are subject to the Act's civil penalties. See 15 U.S.C § 1640(a). The Act defines the term "creditor," in part, as a "person who . . . regularly extends . . . consumer credit." 15 U.S.C. § 1602(f). In addition, Revised Regulation Z provides that the Act and that regulation apply only to individuals or businesses that offer or extend consumer credit when "the offering or extension of credit is done regularly." 12 C.F.R. § 226.1(c)(1)(ii). A footnote to § 226.1(c)(1)(ii) refers to the definition of "creditor" for the meaning of the term "regularly." Revised Regulation Z 226.2(a)(17)(i) defines "creditor" to include a person who

"regularly extends consumer credit," while footnote 3 to that section explains the quoted expression as follows:

> A person regulary extends consumer credit only if it extended credit more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. (emphasis added).

Since Redic did not allege that Schwartz had extended consumer credit other than secured by a dwelling, Schwartz would be a "creditor" within the meaning of the Act only if he extended consumer credit secured by a dewlling at least five times in the preceding or current year prior to the Redic transaction; that is in the period from January 1, 1980 until December 23, 1981 (the date of the Redic transaction).

In her amended complaint Redic

claimed the right to rescind the transaction under the Act, 15 U.S.C. § 1635(a), as implemented by Revised Regulation Z, 12 C.F.R. § 226.23, because the defendants had acquired a "security interest" in real property used as her principal dwelling. This claim required the application of North Carolina law because Revised Regulation Z, 12 C.F.R. § 226.2(a)(25), defines a "security interest" as an interest securing performance that is recognized by state law. Thus, whether Schwartz was a "creditor" within the meaning of the Act turns on whether at least five of the other twelve similar transactions were loans with security interests rather than sales with options to repurchase.

B

Under North Carolina law, the test

for determining whether a conveyance with an option to repurchase represents a true sale or merely a loan with a security interest focuses on the intent of the parties and not the form of the transaction. O'Briant v. Lee, 214 N.C. 723, 200 S.E. 865 (1939); McKinley v. Hinnant, 242 N.C. 245, 87 S.E. 2d 568 (1955). In ascertaining the real intention of the parties, however, the simple declaration of the plaintiff, who was grantor in the deed, will not suffice to show that the parties intended to create a mortgage. The North Carolina Supreme Court has stated:

> The intention [to create a mortgage] must be established, not by simple declaration of the parties, but by proof of the facts and circumstancs dehors the deed, inconsistent with the idea of an absolute purchase; otherwise, solemnity of deeds would always be exposed to the slippery memory of witnesses.

O'Briant v. Lee 214 N.C. at 731, 200 S.E.

at 870 (quoting Watkins v. Williams, 123 N.C. 170, 31 S.E. 388 (1898)). Thus, although a plaintiff may repeatedly testify that the transaction was intended to be a loan and that the land was conveyed for the sole purpose of securing the payment of that loan, the plaintiff must present more than his own simple declaration. Instead, the plaintiff must present proof of facts and circumstances dehors the deed inconsistent with the idea of an absolute purchase.

The North Carolina Supreme Court has identified six factors as pertinent in determining whether a transaction is a sale or a loan: (1) whether there was a debtor-creditor relationship created at the time of the transaction, Hardy v. Neville, 261 N.C. 454, 457, 135 S.E.2d 48, 51 (1964); (2) whether the "grantor" remains in possession or

whether the grantee takes immediate possession of the property, id. at 457, 135 S.E. 2d at 51; (3) whether the "grantor" was under distress and hard-pressed for money at the time of the transaction, O'Briant v. Lee, supra; Hardy v. Neville, 261 N.C. at 457, 135 S.E. 2d at 51; (4) whether the transaction originated out of an application for a loan, O'Briant v. Lee, 214 N.C. at 733, 200 S.E. at 871; (5) whether the purported sale price is less than the net worth of the property, id. at 733, 200 S.E. at 871; and (6) whether the "grantor" was obligated to exercise the "option to repurchase." Hodges v. Hodges, 37 N.C. App. 459, 246 S.E. 2d 812 (1978). The North Carolina Supreme Court has counseled that doubts about whether the transaction is a sale or a mortgage are to be construed in favor of a mortgage in

order to prevent the possibility of oppression created by an outright sale. O'Briant v. Lee, 214 N.C. at 732, 200 S.E. at 869; McKinley v. Hinnant, 242 N.C. at 252, 87 S.E.2d at 573.

C

The first issue presented is whether Schwartz was a "creditor" within the

meaning of the Act.[1] As described above, this issue turns on whether he extended consumer credit secured by a dwelling at least five times in the preceding or current year prior to the Redic transaction, i.e., in the period from January 1, 1980, until December 23, 1981.

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[1] The defendants also argue that the district court's judgment should be reversed because the transaction in question was a sale with an option to repurchase, rather than a loan with a security interest, as a matter of law. In support of this argument the defendants rely on their testimony, Redic's failure to claim a mortgage interest deduction on her income tax return filed after this suit, and the inscription "for rent" placed on all twelve rent payments. We decline to review this contention, however, because the defendant's Rule 50 motions failed to raise any question about the sufficiency of the evidence regarding Redic's claim that the transaction in question was a loan with a security interest. Tights Inc. v. Acme-McCrary Corp., 541 F.2d 1047, 1058 (4th Cir. 1976), cert. den., 429 U.S. 429 (1976). In fact, in one motion defendants' counsel explicitly disclaimed any question of sufficiency on that question.

12 C.F.R. § 226.2(a)(17)(i) n.3. This issue, in turn, depends upon whether five of the previous twelve similar transactions involving Schwartz and Watts Realty Company were, in reality, loans with security interests and not sales with options to repurchase.

Redic introduced direct evidence of intent from only four of the grantors involved in the twelve similar transactions with Schwartz.[2] The defendants, however, introduced unrefuted affidavits

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[2] In her motion for summary judgment Redic submitted the affidavit of James Gillespie. In his affidavit Gillespie stated that his transaction with Schwartz was a loan with a security interest and not a sale with an option to repurchase. At trial, however, Gillespie recanted his prior statement and testified that his transaction was, in reality, a sale with an option to repurchase. But even including Gillespie, Redic introduced direct evidence of intent from only four of the other twelve grantors.

regarding intent from each of the remaining grantors. Each of these latter grantors swore that he had sold his home to Schwartz, had never requested or received a loan from either defendant, and knew that he absolutely sold his property to Schwartz. Several of these grantors later testified at trial on behalf of the defendants. We do not think a jury is free to recharacterize another transaction not the subject of the suit as a loan with a security interest, rather than a sale with an option to repurchase, when the transaction is evidenced by a general warranty deed absolute on its face and both parties to the transaction give unrefuted testimony that the transaction was a sale with an option to repurchase. To allow a jury to recharacterize such a transaction as a loan with a security interest would be contrary to

the North Carolina Supreme Court's command that the true nature of a transaction depends upon the intention of the parties.

The only reasonable inference that could be drawn from the evidence was that Schwartz was not a "creditor" within the meaning of the Act because the evidence conclusively showed that he had not engaged in the requisite number of real estate transactions to be classified as one who "regularly extends . . . consumer credit" 15 U.S.C. § 1602(f); 12 C.F.R. §§ 226.1(c)(1)(ii) and 226.2(a)(17)(i) n.3. Thus, the district court erred in denying Schwartz' motion for directed verdict. Accordingly, we reverse that portion of the district court's decision which awarded Redic relief under the Truth in Lending Act.

III

The second issue concerns Redic's pendent claim under North Carolina usury statute, N.C. Gen. Stat. § 24-2 (1965). The jury awarded Redic $1,944 in damages against Schwartz for charging her usurious interest. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Supreme Court held that if a federal claim against a party is dismissed before trial, the pendent state law claims should be dismissed as well. The Ninth Circuit has held, however, that once a trial is held a court of appeals should order dismissal of a pendent claim on remand only "when the federal cause of action was so insubstantial and devoid of merit that there was no federal jurisdiction to hear it." Traver v. Meshriy, 627 F.2d 934, 939 (9th Cir. 1980) (citing Hagans v. Lavine, 415 U. S. 528 (1973)).

It also stated that if the federal claim was not frivolous, then the issue of whether the district court should have heard the pendent state claim is a matter committed to the sound discretion of the district court. Traver, 627 F.2d at 939.

We conclude that Redic's Truth in Lending claim was not frivolous and that the district court did not abuse its discretion in hearing Redic's pendent North Carolina claim for usury. Therefore, we affirm that portion of the district court's decision awarding her $1,944 in damages against Schwartz for charging her usurious interest. The award of counsel fees was made under the Truth in Lending Act and since recovery under that cause of action has been reversed, the award of counsel fees is also reversed.

REVERSED IN PART,
AFFIRMED IN PART.

Filed June 5, 1985

U.S. COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1393(L)

Mable A. Redic,

Appellee

versus

Gary H. Watts Realty Co., and David S. Schwartz,

Appellants,

and

Shirley E. Schwartz

Defendant.

No. 84-1523

Mable A. Redic,

Appellee,

versus

Gary H. Watts Realty Co., David S. Schwartz,

Appellants,

and

Shirley E. Schwartz,

Defendant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Russell and Judge Haynsworth.

For the court,

John M. Greacen